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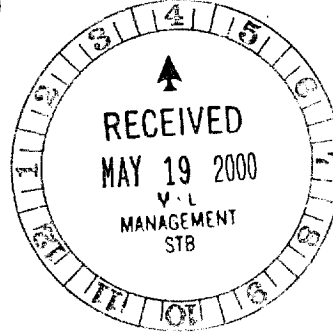
REGIONAL WHIP

Congress of the United States
House of Representatives
Washington, DC 20515

May 19, 2000

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Unit
1925 K Street, N.W.
Washington, DC 20423-0001



198724
JERROLD NADLER
8TH DISTRICT, NEW YORK

REPLY TO:

☐ WASHINGTON OFFICE:
2334 RAYBURN BUILDING
WASHINGTON, DC 20515
(202) 225-5635

☐ DISTRICT OFFICE:
11 BEACH STREET
SUITE 910
NEW YORK, NY 10013
(212) 334-3207

☐ DISTRICT OFFICE:
532 NEPTUNE AVENUE
BROOKLYN, NY 11224
(718) 373-3198

E-mail: jerrold.nadler@mail.house.gov
Web: <http://www.house.gov/nadler/>

Re: STB Ex Parte No. 582 (Sub-No. 1) Major Rail Consolidation Procedures

Dear Secretary Williams:

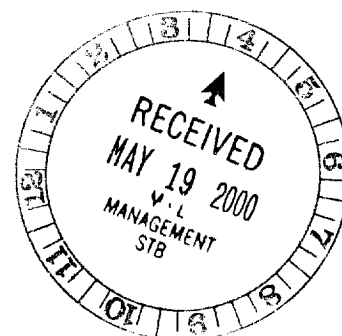
Enclosed for filing in the above referenced matter are an original and 25 copies of the Comments of U.S. Representative Jerrold Nadler. These comments are also enclosed on a 3-1/2" computer disk in WordPerfect.

Sincerely,

Jerrold Nadler
Member of Congress

198724

Before the
SURFACE TRANSPORTATION BOARD



STB Ex Parte No. 582 (Sub-No. 1)

Major Rail Consolidation Procedures

Initial Comments of
U.S. Representative Jerrold Nadler

Marisa L. Milton
Legislative Assistant
U.S. Representative Jerrold Nadler
2334 Rayburn House Office Building
Washington, DC 20515

May 19, 2000

Before the Surface Transportation Board
STB Ex Parte No. 582 (Sub-No. 1)
Major Rail Consolidation Procedures

Comments of U.S. Representative Jerrold Nadler

Introduction

As the United States Representative of parts of Brooklyn and Manhattan in New York, I have been dedicated to improving rail freight access for my region and the entire nation. Since the beginning of my career in public service, it always stood out as a glaring dichotomy that a world-class city like New York could have such poor rail freight access. It is the only major city in North America in which almost everything enters and leaves by truck.

During the division of Conrail, I, along with 23 Members of the House from New York and Connecticut led efforts to mandate competitive rail service by CSX and Norfolk Southern to New York City, Long Island, Westchester, and Connecticut. Appeals of this decision were put on hold as the parties involved entered a stipulation to form an East of the Hudson Task Force to find solutions. The Task Force, which I chair, is intended to negotiate a cooperative plan to improve rail freight service within the region. Despite recent cooperation from railroads, local officials and shippers, the Board must reform its merger regulations.

The goal of the Surface Transportation Board is to assure the nation of a transportation system that is adequate to serve the nation. It must provide adequate service during times of economic prosperity, financial downturns, and in times of national emergency. Adequacy is not to be measured solely by profitability but profitability is generally understood to evidence stability. Unfortunately, mergers which

used to be a device to save service on economically weaker links in the rail network are now pursued solely to maximize profitability. Recent mergers have failed to achieve improved service or profitability.

I support the efforts of the Board to modify its regulations. Its action demonstrates the Board's appreciation of the significance of future mergers. The prospect of only two major railroads dominating the U.S. market, especially because one of those companies would be foreign-controlled, deserves serious consideration. The Board must modify its regulations if the United States is to have an efficient rail system in the next century.

1. The STB must cease considering further reductions of rail facilities as a potential benefit and instead view further reductions as a potential harm.

Current regulations encourage rail consolidations that reduce excess capacity. See 49 C.F.R. § 1180.1 (1999). Merger rules should clarify that further reduction on major lines, even when such reductions will alleviate excess capacity, will no longer be encouraged by the Board.

After enactment of the Staggers Act, a profound loss of railway mileage occurred, reducing the capacity of the national railway system well below prudent levels. The evidence before us indicates that the physical plant of the railway system has been trimmed to levels that deny it the ability to handle any significant increase in traffic. Redundancy has been largely lost, making the system vulnerable to major disruptions.

Where lines have not been eliminated entirely, they have often been single tracked. This creates an inherent inability of the industry to compete for high priority freight. Where trains move in two directions on a well-used single track, they can not move quickly. Thus, industry downsizing, a major by-product of recent consolidations, has significantly and negatively impacted the industry's ability to serve the needs of the 21st Century economy. Excessive downsizing has sabotaged the national goal of maintaining a comprehensive national rail freight service, the statutory mandate of this Board. The Board should look at the possibility of requiring the restoration of track capacity where it is found to be inadequate to move freight in a manner consistent with national needs.

In its current state, the nation's rail system could not withstand a natural or man-made disaster because few supporting parallel facilities remain and few of those remaining are in useable condition. The Board has the obligation to assure that the nation's rail system remains adequate to supply the national economy and to provide for the national defense. As we learned with Conrail, a railway which has downsized to the extent of being able to accommodate only its daily average traffic volumes is absolutely incapable of dealing with any interruption in traffic flow. Such a system can not increase market share, as it has no capacity to handle additional traffic. Consequently, the Board should no longer consider rail line reductions, especially on mainlines, as a potential benefit. These reductions should be considered a potential harm of future mergers and the Board should examine reversing previous reductions.

2. The STB must obtain independent review of all financial and operational analyses submitted by merger applicants.

Current regulations require a merger applicant to provide certain market analyses and operational data in connection with a merger application. See 49 C.F.R. §§ 1180.7, 1180.8 (1999). Recent events demonstrate that the Board, due to constrained staff resources, is not equipped to review these submissions. Almost every major recent merger resulted in a meltdown of service for months following the merger. Operating plans and analyses submitted as parts of merger applications turned out to be works of fiction. Shipments disappeared, trains vanished, and locomotive fleets and crews, which were fully adequate to serve the pre-merger applicants' customers, seemed to disappear overnight when merged operations began and pre-merger service levels could not be maintained. Ports served principally by merged railroads lost traffic to ports served by their competitors. The total financial losses were enormous.

When reviewing future merger applications, the Board must undertake a detailed review and analysis to guarantee that the financial and capacity claims of merger applicants are reasonable. Since the Board has proven incapable of such an analysis, it should obtain an independent review of applicant analyses from an independent consultant or agency. The Board should choose the consultant and direct the study. The consultant or agency must determine whether the applicant can operate efficiently under the plan in issue. The consultant or agency must ascertain if the price paid for the acquisition is fair and affordable, leaving the railroad with sufficient reserves to fund all necessary post-merger capacity related improvements. In addition, the consultant must

report on the compatibility of the information technology of the merged lines, specifically if such technology will be fully compatible by the start date of the merger. Application fees should be increased accordingly to cover the increased costs of these independent audits.

The Board should establish and implement a procedure to avoid a conflict of interest between the consulting firm selected by the Board and the Board's mission. Therefore, any retained consultant must not have an existing business relationship with an applicant that would compromise the consultant's objectivity. Nor should the consultant have any dealings with other parties that may be affected by the acceptance or rejection of the carrier's application.

3. The STB should require applicants to submit analyses in a set format.

Current regulations allow a merger applicant great flexibility in determining what supporting data may be included in an application. See 49 C.F.R. §§ 1180.7, 1180.8 (1999). The varied presentation of data may have contributed to the Board's inability to objectively analyze the potential outcome of a merger. Therefore, the Board should design and establish a fixed format in which data that is required for mergers must be submitted. The Board should expressly enumerate the type and format of data that must be included with an application. This will facilitate an objective review of the data submitted in support of an application. Applicants should continue to be able to submit additional information, as this may be useful in evaluating an application.

4. The Board should impose conditions on mergers under a broader set of circumstances to protect the public interest.

Current regulations provide a general framework for the Board to review merger applications. This scheme has proven ineffective given the large-scale, post-merger disruptions. Under current regulations, the Board favors imposing conditions to protect other carriers only when “essential services” are affected. “A service is defined as essential if there is a sufficient public need for the service and adequate alternative transportation is not available.” 49 C.F.R. § 1180.1(c) (1999). This scheme is too restrictive.

The Board should broadly impose conditions on merger applicants. When major railroads are allowed to merge without restrictions that minimize adverse effects the public suffers. Most importantly, the nation as a whole is adversely affected as a greater number of shippers switch to trucks to move goods. Increased truck traffic increases the cost of goods, poisons our air, and accelerates the wear and tear on the nation’s infrastructure. However, many shippers feel compelled to move their goods by truck since the reliability and cost-efficiency of the rail system has significantly deteriorated. The Board should impose broad conditions on mergers when necessary to prevent further erosion of the nation’s rail system. These conditions are necessary and should be imposed even when alternative transportation is available, especially when the only transportation alternative is to move goods by truck.

5. The STB must recognize that competition is not enough to mitigate the potential negative effects of major mergers and implement regulations accordingly.

The Board must recognize the harm to shippers and consumers brought on by recent mergers. Because the Board instituted conditions to foster competition and recent service disruptions still occurred, it is obvious that competition alone is not enough to guarantee an efficient national rail system. Competition between mega carriers will not be adequate protection for any but the largest shippers who have access to both carriers and enough traffic to be of interest to them. Where the nation faces a duopoly, the needs and desires of private management must be placed squarely second to the nation's goal of providing the entire nation with efficient service at fair prices.

The Board should take action to deal with environmental factors, particularly within urban areas suffering from severe pollution. The goal must be not only to serve present rail shippers, but also to encourage as much traffic as possible to shift to environmentally efficient rail carriage.

Duplicate lines should not be under single management. These situations should be altered even if the problem requires appending a line to a non-applicant. Missing links must be put in place even where an applicant does not own a logical link and the owner does not seek inclusion. Funds should be shifted to assure that track owners have the needed ability to maintain and improve service particularly where a duplicate line or link must be given to a financially weak carrier to assure continued service. A major carrier should be required to subsidize such a carrier if that is what is needed to maintain competition, redundancy, or access to a population center.

6. The STB should eliminate the “one case at a time” rule.

Applications should no longer be viewed in isolation. The one case at a time practice should be eliminated and the Board should begin to consider how non-party carriers might react to a potential merger and the cumulative effects of a foreseeable trend. Each application should be viewed as a reshuffling of the entire national system and ownership of lines by an applicant should not restrict the Board’s ability to realign assets to achieve competition, redundancy and adequate service for *all* markets. The nation cannot afford the luxury of considering one merger at a time when reality dictates that one merger will likely lead to another.

Recently, Burlington Northern Santa Fe and Canadian National were poised to join forces and become the largest bi-national railroad. If successful, the two railroads would extend from Canada through the U.S. and into Mexico. The inevitable result would be that the remaining Class I’s would merge in order to compete with the giant. The likelihood that the U.S. would have but two major railroads is a real possibility if rail mergers continue.

Competition and innovation rarely spring from monopoly. Further consolidations should not occur until the nation has had an opportunity to review the consequences of previous mergers. Now is the time to step back and undertake a study of the impact of rail consolidations before any new applications are reviewed. The financial consequences of any future consolidation must be carefully reviewed. We must ascertain the adequacy

of the rail freight system, what is necessary to make it ready for the 21st century, and whether further consolidation advances or hinders this objective.

7. The Board should prevent any effort by applicants to “cram down” labor conditions on rail employees after a merger is completed.

The Board should prohibit carriers from the practice known as “cram down”, in which private collective bargaining agreements are broken by forcing modified conditions on rail workers. Carriers are currently able to override agreements by arguing that such action is necessary to complete a transaction, and the STB has accepted this argument on numerous occasions. The Board should allow modification of a collective bargaining agreement only if both labor and rail management agree.

Certificate of Service

I hereby certify that on the 19th day of May, 2000, I served a copy of the foregoing Comments of United States Representative Jerrold Nadler on all the parties of record in this docket.


Marisa L. Milton